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No. 98-184

In the
Supreme Court of the United States
October Term, 1998

The State of Wyoming,

Petitioner,

-against-

Sandra Houghton,

Respondent.

On Writ of Certiorari
To The Wyoming Supreme Court

BRIEF OF THE LEGAL AID SOCIETY OF NEW YORK CITY AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether, when probable cause exists to search a vehicle for contraband, the inference that the probable cause extends to all containers in the vehicle is negated when the police are aware that a particular container, although capable of concealing the object of the search, belongs to a person under no criminal suspicion, and a search of the container in question would thus be unlawful in the absence of probable cause to believe that particular container is concealing the object of the search.

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INTEREST OF AMICI CURIAE

The Legal Aid Society is a private, non-profit legal services agency that represents the majority of indigent criminal defendants in New York City. Its Criminal Appeals Bureau is the primary appellate defender in New York City. The National Legal Aid and Defender Association is the only national organization devoted exclusively to ensuring competent legal representation for indigent people in both civil and criminal cases nationwide. Its defender division represents public defenders and other providers of legal services to the nine out of ten criminal defendants in America who are unable to pay for a lawyer. The Association seeks to promote balance in the justice system's laws and procedures, and to ensure equal justice for all, regardless of race, ethnicity or income.

The scope of police authority to search the person and personal effects of an automobile passenger in the absence of probable cause implicates a citizen's Fourth Amendment right to be free from unreasonable searches and seizures, and the amici organizations have an interest in ensuring the protection of this right.

This brief is submitted with the consent of both petitioner and respondent.

SUMMARY OF ARGUMENT

The Fourth Amendment protection against unreasonable searches and seizures is not waived simply because one has entered an automobile. "Only the prior approval of the magistrate is waived; the search otherwise is as the magistrate could authorize." *United States v. Ross,* 456 U.S. 798, 823 (1982). The scope of searches under the "automobile exception" is thus "no narrower – and no broader – than the scope of a search authorized by a warrant supported by probable cause." *Id.*

In defining the scope of the "automobile exception," this Court has repeatedly underscored the importance of strict adherence to the probable cause requirement of the Fourth Amendment. In *Ross*, this Court held that, just as a warrant to search premises extends to closets and containers, so, too, might a warrantless search under the "automobile exception" extend to containers within the vehicle. *Id.* at 820-821. Probable cause in the context of a moving vehicle, however, does not automatically extend to the entire vehicle. Indeed, when police have probable cause to search a particular container but lack probable cause to search the remainder of the vehicle, a search of the remainder of the vehicle is forbidden. *Id.* at 824. This Court restated this principle in *California v. Acevedo*, 500 U.S. 565, 580 (1991), when it noted that, although police had probable cause to search a container in the trunk of a vehicle, they would not have been authorized to search the entire vehicle.

It follows, then, that, if the police have probable cause to believe that a vehicle contains drugs, but they know that a container capable of concealing the object of the search

belongs to a person as to whom no suspicion exists, the rationale animating the automobile exception's license to search closed containers is defeated because the inference that the probable cause extends to that particular container has been negated. Under those circumstances, in the absence of probable cause to believe that particular container is concealing the object of the search, the search of such a container would be unlawful.

The adoption of a *per se* rule that authorizes police to search, pursuant to the "automobile exception," a container that they know has no connection to the rationale that gave rise to the probable cause to search the vehicle — and that police would thus not be authorized to search pursuant to a warrant — would eliminate the probable cause requirement of the Fourth Amendment.

Probable cause to search a container that police know to belong to someone under no criminal suspicion cannot be inferred by its mere presence in the automobile to be searched. For when the source of probable cause to search a vehicle is particular to one person in the vehicle, that probable cause does not extend to other passengers in the car in the absence of individualized suspicion. *United States v. DiRe*, 332 U.S. 581, 587 (1947); *see also Ybarra v. Illinois*, 444 U.S. 85, 91 (1979).

This is not to say that the lawfulness of the search of an automobile passenger's personal belongings turns solely on whether police possess individualized suspicion that the passenger is engaged in criminal activity. If a police officer possesses some reason other than the bag's mere presence in the automobile to believe the bag might actually contain

the object of the search, then the probable cause that presumptively extends to all containers in the vehicle would not be negated by the fact that the officer did not suspect the owner of the container in question of criminal activity, and a search of the container would be lawful. In the absence of such evidence, however, the search of a bag that belongs to a passenger whom police do not suspect of a crime would be supported only by the theory of "guilt by association." This Court has consistently rejected this doctrine. *See, e.g., Ybarra*, 444 U.S. at 91; *DiRe*, 332 U.S. at 593.

Moreover, and as petitioner concedes, this Court has consistently recognized that citizens do not sacrifice their privacy interest in their personal belongings simply because they place those belongings in an automobile. *See, e.g., Rios v. United States*, 364 U.S. 253, 262 n.6 (1960). Consequently, this Court has never held that a full-blown search of a citizen's personal property, where the sole justification is to search for evidence of a crime and protect officer safety, is authorized in the absence of probable cause. *See Terry v. Ohio*, 392 U.S. 1, 29 (1968). Under such circumstances, a citizen's privacy interest necessarily outweighs the government interest in searching for evidence and the public concern for officer safety.

The *per se* rule proposed by petitioner thus utterly ignores the probable cause requirement of the Fourth Amendment. Such a rule is unnecessary when the easily applied "notice" test, which authorizes police to search all containers except those that they know or should know belong to someone as to whom no suspicion exists, protects citizens from unreasonable searches of their personal effects.

ARGUMENT

A *PER SE* RULE AUTHORIZING A SEARCH, WITHOUT PROBABLE CAUSE, OF AN AUTOMOBILE PASSENGER'S PERSONAL BELONGINGS UNDERMINES THE PROBABLE CAUSE REQUIREMENT OF THE FOURTH AMENDMENT, ENDORSES THE DOCTRINE OF "GUILT BY ASSOCIATION," AND IGNORES THE PRIVACY INTERESTS OF THE PASSENGER.

A. The "automobile exception" does not eliminate the probable cause requirement of the Fourth Amendment.

Since the creation of the "automobile exception," this Court has emphasized that all warrantless searches of automobiles must be based on probable cause. In *Carroll v. United States*, 267 U.S. 132, 153 (1925), this Court recognized the impracticalities of obtaining a search warrant for a moving vehicle, and thus ruled that the Fourth Amendment may permit a search of an automobile without a warrant. This Court emphasized, however, that such a search may be conducted only when there is probable cause to believe that a vehicle contains contraband. *Id.* at 154.

In the course of defining the scope of searches under the "automobile exception," this Court has consistently cautioned that the exception does not vitiate the Fourth Amendment's mandate that searches be conducted pursuant to probable cause. The Fourth Amendment is not waived simply because one has entered an automobile. "Only the prior approval of the magistrate is waived; the search otherwise is as the magistrate could authorize." *United States v. Ross*, 456 U.S. 798, 823 (1982).

In *Ross*, this Court explained that the probable cause determination for a warrantless search of a vehicle "must be based on objective facts that could justify the issuance of a warrant by a magistrate . . . ." *Id.* at 808. The scope of a warrantless search of an automobile pursuant to such probable cause is thus "no narrower — and no broader — than the scope of a search authorized by a warrant supported by probable cause." *Id.* at 823.

This Court held in *Ross* that, just as a warrant to search premises extends to closets, containers, and drawers in which the object that is the subject of the warrant might be concealed, so, too, would a "warrant to search a vehicle [ ] support a search of every part of the vehicle that might contain the object of the search." *Id.* at 820-821. Thus, under the "automobile exception," the warrantless search of a vehicle might also extend to containers within the vehicle. This extension, however, is conditioned on the preliminary determination that probable cause exists to "justif[y] the search of every part of the vehicle and its contents that may conceal the object of the search." *Id.* at 825.

Probable cause in the context of a moving vehicle does not, this Court warned in *Ross*, automatically extend to the entire vehicle. For when the police have probable cause to believe that a particular container in a vehicle contains contraband, but they affirmatively lack the requisite probable cause to believe that other parts of the vehicle contain contraband, a search of the remainder of the vehicle is forbidden. *Id.* at 824. Indeed, this Court explained:

> Just as probable cause to believe that a stolen lawnmower may be found in a garage will not

> support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. *Id.*

It follows, then, that, if the police have probable cause to believe that a vehicle contains drugs, but they know that a container capable of concealing the object of the search belongs to a person as to whom no suspicion exists, the rationale animating the automobile exception's license to search closed containers is defeated because the inference that the probable cause extends to that particular container has been negated. Under those circumstances, in the absence of probable cause to believe that particular container is concealing the object of the search, the search of such a container would be unlawful.

This Court again underscored the importance of strict adherence to the probable cause requirement in the context of the "automobile exception" in *California v. Acevedo*, 500 U.S. 565 (1991). In *Acevedo*, the police had probable cause to believe that a bag in the trunk of a vehicle contained marijuana. This Court ruled that the warrantless search of the bag was lawful because the probable cause requirement had been satisfied. 500 U.S. at 580. This Court again emphasized, however, that police were prohibited from searching those areas of the vehicle for which they lacked probable cause:

> The facts in the record reveal that the police did not have probable cause to believe that contraband was hidden in any other part of the

> automobile and a search of the entire vehicle would have been without probable cause and unreasonable under the Fourth Amendment. *Id.*

This Court's holdings in *Ross* and *Acevedo* did not address the question of whether the police are authorized, under the "automobile exception" to the warrant requirement, to search a container they know to be the personal property of a person who is not under criminal suspicion. In both *Ross* and *Acevedo*, only one person was traveling in the vehicle involved, and the containers searched were thus implicitly connected to the person who was the genesis of the probable cause. Likewise, in *Carroll v. United States*, *supra*, 267 U.S. at 160, although more than one person was traveling in the car that was ultimately searched, the police had probable cause to believe that all of the car's occupants were engaged in illegal activity.

The rationale underlying *Ross* and *Acevedo* cannot be logically extended to encompass the search of a container that the police know to belong to someone whom they do not suspect of a crime. Indeed, in *Ross* and *Acevedo*, this Court expressly disapproved a search of a portion of a vehicle for which the police possess information that negates the inference that the probable cause extends to that portion of the vehicle. The adoption of a *per se* rule that authorizes police to search, pursuant to the "automobile exception," a container that they know has no connection to the rationale that gave rise to the probable cause to search the vehicle — and that police would thus not be authorized to search pursuant to a warrant — would eliminate the probable cause requirement of the Fourth Amendment.

B. That the bag of a passenger who is under no criminal suspicion is present in a vehicle that police have probable cause to believe contains contraband does not, standing alone, justify the search of the bag under the rationale of the "automobile exception."

When police officers have probable cause to search a vehicle for contraband, but they are aware that a particular container capable of concealing the object of the search belongs to a passenger for whom the police lack any criminal suspicion, a search of that container based solely on its presence in the automobile cannot be justified under the rationale of the "automobile exception." Under such circumstances, probable cause to search the container in question cannot be inferred by its mere presence in the automobile to be searched, for the application of such an inference deprives the owner of the container of her Fourth Amendment right to be free from unreasonable searches and seizures.

When the source of probable cause to search a vehicle is particular to one person in the vehicle, that probable cause does not extend to other passengers in the car in the absence of individualized suspicion. As this Court explained in *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979):

> Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut by simply pointing to the fact that coincidentally there exists probable cause to

> search or seize another or to search the premises where the person may happen to be.

Thus, in *Ybarra*, this Court held that the patrons of a tavern that was the subject of a search warrant were cloaked with the Fourth Amendment protection against unreasonable searches and seizures. *Id.* "That individualized protection was separate and distinct from the Fourth and Fourteenth Amendment protection possessed by the proprietor of the tavern," who was also the subject of the warrant. *Id.* at 91-92.

Likewise, persons in automobiles are entitled to the individualized protections afforded by the Fourth Amendment. In *United States v. DiRe*, 332 U.S. 581, 587 (1947), this Court held that probable cause to search a vehicle cannot sustain the search of a passenger whom the police lack probable cause to believe is engaged in criminal activity.

This is not to say that the lawfulness of the search of an automobile passenger's personal belongings turns solely on whether police possess individualized suspicion that the passenger is engaged in criminal activity. Certainly, if a police officer, although aware that a container belongs to such a passenger, has some reason other than the bag's mere presence in the automobile to believe the bag might actually contain the object of the search, then a search of the bag would be lawful, under the "automobile exception," in the absence of individualized suspicion.

For example, if an officer observed the occupants of a stopped vehicle making furtive movements toward each other, or saw an occupant reach into the backseat of the

vehicle, that officer, upon developing probable cause to search the vehicle, might then have a legitimate basis for believing that the object of the search was being secreted in another passenger's belongings. In the presence of such facts, the probable cause that presumptively extends to all containers in the vehicle would not be negated by the fact that the officer did not suspect the owner of the container in question of criminal activity.

In the absence of such evidence, however, the search of a bag that belongs to a passenger whom police do not suspect of a crime would be supported only by the theory of "guilt by association." This Court has consistently rejected this doctrine.

In *DiRe*, the government argued that, when there is probable cause to search a vehicle for contraband, police may search any passenger in the vehicle if the object of the search is capable of being concealed on the person. *Id.* at 584. This Court explicitly rejected this argument and noted, "Presumptions of guilt are not lightly to be indulged from mere meetings." 332 U.S. at 593. This Court specifically noted that, in the absence of any indication that a person is connected to the underlying probable cause, "[a]ny inference that everyone on the scene of a crime is a party to it must disappear . . . ." *Id.* at 594.

Twenty years later, this Court again rejected the theory of "guilt by association" in *Sibron v. New York*, 392 U.S. 40 (1968). In *Sibron*, the police arrested the defendant and searched his pockets simply because they saw him talking to known drug addicts over the course of an eight-hour period. This Court held that the defendant's association

with known drug addicts, standing alone, did not create the requisite probable cause:

> The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security. *Id.* at 62.

In *Ybarra,* 444 U.S. at 88, the police obtained a warrant to search a small, one-room bar and the person of the bartender for narcotics. The police proceeded to search the defendant, who was one of twelve patrons in the bar. This Court held that the defendant's mere presence in the room where drugs were believed to be located could not, standing alone, justify the pat-down search of his person. This Court explicitly stated, "[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." *Id.* at 91, *citing Sibron v. New York*, 392 U.S. at 62-63.

The inference that, because one passenger in an automobile stopped for speeding admits to police that he uses illegal drugs, all of the passengers potentially possess narcotics, is *per se* unreasonable. *Sibron*, 392 U.S. at 62. Likewise, the inference that a person traveling in a car with someone suspected of a crime is presumptively aware of that person's criminal activities and capable of hiding that person's contraband is *per se* unreasonable. *DiRe*, 332 U.S. at 593.

Nor can the mere possibility that the criminally liable might be capable of placing their contraband in another

person's bag without that person's knowledge, standing alone, amount to probable cause. Indeed, in this case, that possibility was apparently not even present in the mind of the officer who conducted the search of the vehicle and the passenger's bag. As the Wyoming Supreme Court noted, the officer testified that there were no sudden movements within the car and that the occupants were under constant observation (Pet. App. 18). Thus, "[t]he officer's testimony clearly established that there was no reason to believe the object of the search was placed in the purse prior to the stop . . . ." *Id.*

Clearly, the officers here were concerned only with the potential criminal activity of the passenger, since, upon discovering narcotics in the passenger's bag, the police arrested the passenger and ultimately released their original suspect, who had admitted that he used drugs. Had the officers been truly searching the bag for the original suspect's narcotics, they surely would have arrested that suspect when they found narcotics in the passenger's bag, particularly since the passenger denied ownership of some of the narcotics discovered therein.

The theory of "guilt by association" is not somehow more palatable because the association in question occurs within an automobile. Contrary to petitioner's assertions, a more intimate relationship between persons is not implied by the fact that they travel together in a car. Indeed, there are countless examples that demonstrate why persons traveling together in automobiles are not presumptively aware of the criminal activities of fellow passengers.

The notion that a passenger in a limousine would be aware that the chauffeur has a bag of drugs stashed between the two front seats, let alone that the passenger logically possesses drugs because the chauffeur is a drug user, belies common sense. Under the *per se* rule proposed by petitioner, however, the limousine passenger would, by virtue of his or her presence in a vehicle that the police had probable cause to search, be forced to submit his briefcase to a full-blown search for narcotics.

Similarly, the millions of people who ride in car pools to work each day would, because they share the common purpose of commuting from a suburb to an urban center, be presumed to be complicit in the criminal activities of their fellow commuters. In reality, however, these people, who, while in the car, may be reading the paper or a novel when it is not their day to drive, are not likely to be sharing the intimate details of their lives, let alone their potentially illegal activities, with each other.

Likewise, it cannot logically be presumed that the lower-income person who cannot afford the luxury of a vehicle is aware that the neighbor who has offered a ride has contraband in his car. Nonetheless, that passenger, who, for example, would have no reason to know that the tools in the neighbor's car could form the probable cause to believe the neighbor committed a recent burglary in the area, will now be forced to stand by while her bag is searched in the presence of not just the neighbor, but anyone else who happens by the scene of what was initially a traffic stop.

Associations in automobiles are certainly no more fraught with the potential for criminal conspiracy than

associations in small neighborhood taverns. *See Ybarra*, 444 U.S. at 91. Nor do automobiles present a greater opportunity for the criminally liable to hide their contraband in another's bag or jacket without that person's knowledge. Although passengers in automobiles have easy access to each other's belongings, for that very reason any attempt by a vehicle occupant to place contraband in another's bag or jacket is more likely to be detected within the close confines of the vehicle, where everything within reach is also within everyone's immediate view. Indeed, the opportunities for hiding contraband in another person's belongings without that person's knowledge are much greater in fixed premises, where people are more likely to leave their jackets in a closet accessible to others, or place their purses or briefcases in another room.

Therefore, nothing about an automobile, as opposed to fixed premises, can justify the abandonment of an individual's Fourth Amendment right to be free from unreasonable searches and seizures simply because someone else in the vehicle is suspected of a crime. *See DiRe*, 332 U.S. at 593. The *per se* rule proposed by petitioner, however, would make legitimate the doctrine of guilt by association, and would deprive all persons traveling in automobiles of the protection of the Fourth Amendment.

C. Citizens do not forfeit their expectation of privacy in their personal belongings by placing them in an automobile.

In *Delaware v. Prouse*, 440 U.S. 648, 662-663 (1979), this Court articulated the privacy interests of persons traveling in automobiles:

> An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to governmental regulation. Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusions every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed.

Certainly, this Court has noted that the nature of an automobile results in a lessened expectation of privacy therein. *New York v. Class*, 475 U.S. 106, 112 (1985). This does not mean, however, that the Fourth Amendment protection from unreasonable searches and seizures is forfeited by entry into a moving vehicle. Instead, this Court has emphasized that "[a] citizen does not surrender all the

protections of the Fourth Amendment by entering an automobile." *Id.*

Indeed, in *DiRe*, 332 U.S. at 586-587, this Court explicitly ruled that a passenger in an automobile does not surrender his expectation of privacy in his person, even when the police have probable cause to believe that the vehicle contains contraband that is capable of being concealed on the person.

More recently, in *Maryland v. Wilson*, 519 U.S. 408 (1997), although this Court held that an order to exit a vehicle during a routine traffic stop was not a violation of a passenger's implicit and intact right to be free from unreasonable searches and seizures, it nevertheless recognized that an automobile passenger does not waive the protection of the Fourth Amendment. In *Wilson*, this Court balanced a passenger's liberty interest against the public concern for officer safety and determined that the order to exit the vehicle was reasonable under the Fourth Amendment because, where a passenger is already detained by virtue of the traffic stop of a vehicle, the additional intrusion of requiring the passenger to exit the vehicle is "minimal." *Id.* at 415.

Nor do persons sacrifice their privacy interest in personal belongings simply because they place those belongings in an automobile. In *Rios v. United States*, 364 U.S. 253 (1960), this Court held that a passenger in a taxicab is entitled to Fourth Amendment protection, even if the passenger places the package in question on the floor of the taxicab. *Id.* at 262 n.6. In *New York v. Belton*, 453 U.S. 454, 461 (1981), this Court again implicitly recognized that

a person does not abandon his or her privacy interest in personal belongings when he or she places those belongings in an automobile. Although this Court held in *Belton* that police could lawfully search the jacket of a passenger incident to that passenger's arrest, it emphasized that

> the justification for the search is not that the arrestee [a passenger] has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have.

Id.[1]

Petitioner concedes that citizens do not waive the protection of the Fourth Amendment or their privacy interest

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[1] The dissent in the Wyoming Supreme Court argued that respondent forfeited her expectation of privacy in her purse when, after being ordered by police to exit the vehicle, she left the purse in the vehicle (Pet. App. 24-25). This can hardly be said to constitute an abandonment of one's expectation of privacy in a closed bag containing personal belongings. Certainly, "society is prepared to accept . . . as objectively reasonable" an expectation of privacy in one's purse temporarily left behind in an automobile that one has been ordered by police to exit. *See California v. Greenwood*, 486 U.S. 35, 39-40 (1988).

Indeed, it would be unusual, and even dangerous, for a person to reach for his or her personal belongings before complying with a police order to exit the vehicle. Moreover, when police officers order people out of vehicles, they often order such people to leave their personal belongings in the car. Under the Wyoming Supreme Court dissent's reasoning, then, passengers who leave their belongings behind when they are lawfully ordered out of vehicles during routine traffic stops would be helpless to challenge a search of their belongings during the course of the traffic stop.

in their personal belongings when they enter an automobile. *See Brief for the Petitioner*, p. 30. Petitioner asserts, however, that, at the moment a vehicle becomes the subject of probable cause, each and every passenger's Fourth Amendment right to be free from an unreasonable search and seizure of their personal effects simply disappears, even when the source of the probable cause is a different passenger. *Id.* Such a drastic leap, however, utterly ignores this Court's explicit recognition that automobile passengers do not abandon all privacy interests in their persons or their personal belongings. *Rios*, 364 U.S. at 262; *DiRe*, 332 U.S. at 586-587.

D. Both the government interest in searching for evidence of crime and the public interest in officer safety are necessarily outweighed by the absence of probable cause to conduct a search of a citizen's personal belongings.

This Court has never held that a full-blown search of a citizen's personal property, where the sole justification is to search for evidence of a crime, is authorized in the absence of probable cause. On the contrary, when confronted with full-blown searches for evidence conducted without probable cause, this Court has unequivocally ruled that such searches violate the Fourth Amendment. *See Ybarra*, 444 U.S. at 91; *DiRe*, 332 U.S. at 587.

Manifestly, the government's interest in searching for evidence of crime and preventing its destruction or disappearance lies at the heart of every Fourth Amendment inquiry. This Court, however, has explicitly and consistently rejected the notion that the full-blown search of persons or their belongings without probable cause can ever be justified

by the "need to prevent the disappearance or destruction of evidence of crime." *Terry v. Ohio*, 392 U.S. 1, 29 (1968), *citing Preston v. United States*, 376 U.S. 364, 367 (1964). Moreover, this Court has specifically rejected the argument, which permeates the brief of petitioner and those of amici in support thereof, that "the important governmental interest in effectively controlling traffic in dangerous, hard drugs and the ease with which the evidence of narcotics may be concealed or moved around from person to person" can ever outweigh the probable cause requirement of the Fourth Amendment. *Ybarra*, 444 U.S. at 94 (*quotations omitted*).

Likewise, when the search involved is the full-blown search of personal effects, the probable cause requirement necessarily outweighs the public concern for officer safety. For the only intrusion authorized by a concern for officer safety is the pat-down frisk, by definition less intrusive than a full-blown search of a person or her belongings. *Terry*, 392 U.S. at 24-25. Even the pat-down search, however, must be based on some quantum of suspicion. *Id.* at 27 (a pat-down search is justified only when there is an articulable fear that the person to be frisked is armed and dangerous).

Moreover, any unique safety concerns that might be presented by the search of a vehicle for evidence are necessarily accommodated by the rule this Court adopted in *Maryland v. Wilson,* 519 U.S. at 414-415. In *Wilson*, this Court deemed the order to exit a vehicle in which a person is already lawfully detained as a limited additional intrusion that sufficiently ensures officer safety. *Id.* To now bootstrap a full-blown search of a passenger's belongings onto *Wilson*, simply because there is now probable cause to believe that the vehicle — but not the passenger's bag — contains

evidence of a crime, would be to reject what this Court has historically deemed reasonable in the name of officer safety. *See Terry*, 392 U.S. at 24.

Notably, if a search of a passenger's belongings in the absence of probable cause could be justified under the rationale that a search of a vehicle for drugs is inherently dangerous, then this Court would not have explicitly stated that police are prohibited from searching a vehicle, even after the officers have discovered drugs in the trunk of that vehicle, when the police otherwise lack probable cause to search the remainder of the vehicle. *Acevedo*, 500 U.S. at 580.

The officers in the present case took command of the situation by ordering the driver and all of the passengers out of the car. Moreover, they took the additional, and questionable, step of frisking the passengers in the absence of any articulable suspicion that the passengers were armed or dangerous. *See Terry*, 392 U.S. at 27.[2] To hold that police officers may now take the additional step of conducting a full-blown search of all passengers' personal belongings, in the name of safety, when the officers lack any basis for believing that the passengers present a safety threat — and thus lack even the authority to frisk the passengers — would be to necessarily overrule *Terry*.

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[2] The propriety of the officers' frisk of the passengers is not before this Court, although, as the Wyoming Supreme Court noted, a frisk in the absence of reasonable suspicion that a person is armed and dangerous has been condemned by this Court. Pet. App. 3 n.1, *citing Terry v. Ohio*, 392 U.S. 1; *see also Ybarra*, 444 U.S. at 93.

Strict adherence to the principles in *Terry* in the context of the "automobile exception" does not, contrary to petitioner's assertions, create an anomalous distinction between searches incident to arrest and searches for evidence. As the Solicitor General concedes, this Court has not addressed the question of whether police may search, incident to the arrest of one vehicle occupant, the belongings of a passenger who is under no criminal suspicion whatsoever (*Brief for the United States as Amicus Curiae*, p. 24). *See Belton*, 453 U.S. at 461 (search of automobile passenger's jacket was lawful because it was incident to that passenger's arrest); *see also United States v. Bell*, 762 F.2d 495, 499 n.5 (6th Cir. 1985) ("*Belton* and *Chimel* [395 U.S. 752 (1969)] do not support the proposition that the search of the passenger compartment of an automobile authorized by *Belton*, 453 U.S. at 460, extends to passengers in a car driven by one who is being arrested pursuant to a warrant"); *Commonwealth v. Shiflet*, 670 A.2d 128, 131 (Pa. 1995) (citations omitted) ("*Belton* and *Chimel* have not been extended to divest a third party of his or her legitimate expectation of privacy").

In any event, the rationale underlying the search-incident- to-arrest doctrine – the danger to the officer and the potential destruction of evidence – is manifestly inapplicable in a non-arrest situation where the police are simply searching for evidence. As this Court has recognized, the potential peril inherent in the situation that confronts an officer increases once the officer begins the process of effecting an arrest. *See Chimel v. California*, 395 U.S. 752, 763 (1969). However, absent an arrest, this Court has expressly held that concerns for officer safety and the need to seize evidence cannot justify a full-blown search of personal effects on less than probable cause. *See Ybarra*, 444 U.S. at 94; *Terry*,

392 U.S. at 24. Thus, even were a search of a passenger's belongings authorized pursuant to the search-incident-to-arrest rule, it would not be anomalous to hold that a search of a passenger's belongings during a search for evidence, and in the absence of an arrest, is unlawful.

In sum, the probable cause requirement necessarily outweighs both the fear that evidence of a crime might escape detection and concerns for officer safety. Manifestly, when police are prohibited from searching persons or their property on mere hunches, *see Terry*, 392 U.S. at 27, the possibility always exists that evidence of a crime will, in some instances, go undetected. However, a *per se* rule that authorizes searches of all automobile passengers' belongings in the absence of probable cause would extend unfettered discretion to police officers, and would subject citizens to unjustified and humiliating intrusions into their personal effects. The Fourth Amendment, and this Court's jurisprudence, do not tolerate such a blatant disregard of personal privacy.

E. A *per se* rule that authorizes blanket searches, pursuant to the "automobile exception," of all passengers' personal belongings is unnecessary because an easily applied and narrow rule exists that authorizes police to search all containers as to whose ownership they are uncertain, and at the same time preserves the probable cause requirement of the Fourth Amendment.

A *per se* rule that strips all persons traveling in an automobile of their individual Fourth Amendment protection against unreasonable searches and seizures is unnecessary when a flexible and workable test is readily available to the

officer in the field. Under the "notice" test articulated by the Wyoming Supreme Court, a police officer is prohibited from searching only those containers that he or she knows or should know belong to a person for whom the officer lacks any particularized suspicion and whose connection to the vehicle to be searched is merely that of a passenger.

The "notice" test is not difficult for a police officer to understand or apply. Indeed, in the present case, the police officer testified that he knew the purse in question belonged to the respondent before he ever searched it. Thus, the facts immediately presented to the officer in this case vested him with actual knowledge that the purse belonged to someone other than the driver, who was the only person the officer suspected of criminal activity. The officer also testified that he saw no sudden movements in the vehicle that would otherwise have led him to believe that the driver's drugs, the object of the search, were potentially concealed in respondent's purse.

As this case demonstrates, the "notice" test does not require extensive inquiry as to a bag's ownership. Plainly, under the test, if an officer is uncertain as to who owns a bag, the officer may search it pursuant to the "automobile exception." By definition, then, the "notice" test would ultimately preclude searches of only a limited category of items that are readily and immediately identifiable to an officer as belonging to specific persons within a vehicle. For it is only when an officer knows or should know from the immediate, objective facts that a particular bag within the vehicle is owned by a person who is under no criminal suspicion, the officer is precluded from searching that bag

absent probable cause to believe that the object of the search is in that particular bag.

Certainly, under the "notice" test, courts would be required to determine, in the absence of an officer's actual knowledge that a container is owned by a particular person, whether the officer should have known the container belonged to that person. Every day, however, courts review objective facts available to police officers in order to determine if searches and seizures are reasonable under the Fourth Amendment:

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?

Terry v. Ohio, supra, 392 U.S. at 21-22 *(citations omitted)*.

Thus, in *Terry*, *id.* at 27, even the less intrusive pat-down search required a case-by-case analysis of the facts that contributed to a police officer's suspicion. It follows

that, when the search in question is a full-blown intrusion into a citizen's personal belongings, some case-by-case inquiry into the reasonableness of the police intrusion is required by the Fourth Amendment.

Indeed, it can be said that uniform enforcement of the probable cause requirement of the Fourth Amendment can be achieved only through the adoption of the notice test. For a *per se* rule that authorizes the search of all containers, regardless of ownership, is fraught with the potential for abuse. Such a rule vests police officers with unfettered discretion to conduct searches of vehicle passengers and their belongings, even when neither bear any relationship to the probable cause that the police have acquired.

Under petitioner's reasoning, anything capable of concealing the evidence for which the police are searching could be searched, regardless of information negating the inference that probable cause extends to all of the containers in the vehicle. Thus, if the object of the search is drugs, which can be just as easily concealed in a coat or pants pocket as they can in a bag, what is to stop a police officer from searching the actual persons of all passengers in a vehicle that is the subject of probable cause? If the officer is arbitrarily limited to only a passenger's personal effects, and precluded from a search of the person, is he or she authorized to search only those bags that are physically within the automobile, or may the officer search a bag that a passenger carries out of the vehicle? What if a passenger exits the vehicle with a bag on her shoulder and then, during the course of the search, places the bag on the ground near the vehicle? Certainly, none of these scenarios negates the fact that the object of the search is capable of being concealed in

the bag. Where is this Court to draw the alleged "bright line"?

Thus, the *per se* rule proposed by petitioner, in the name of uniformity, would, quite simply, turn the Fourth Amendment on its head. The notice test, however, would provide officers with straightforward and necessary guidance and ensure that automobile searches are properly conducted pursuant to the probable cause requirement embodied in the "automobile exception" and the Fourth Amendment.

CONCLUSION

The judgment of the Wyoming Supreme Court should be affirmed.

Respectfully submitted,

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